

# Moral Rights and The Internet: Squaring the Circle

Lionel de Souza and Charlotte Waelde\*

## Introduction

The Internet, it is said, makes territorial borders redundant<sup>1</sup>. Information in digitised form of pictures, text, music, photographs can all be seamlessly disseminated from one side of the globe to the other. There is (almost) nothing to stop these works from being uploaded, made available, communicated, distributed and finally downloaded anywhere in the world. Despite the emergence of decisions intended to give a more territorial character to the contents posted on the Internet<sup>2</sup>, borders, whether physical or psychological, do not (at present) seem to exist for the users. The effect of this absence of borders is that in many areas of law acute questions arise over matters of jurisdiction and, notably, choice of law. In the event of a dispute concerning artefacts made available on a website considered illegal in one country but not in another, exactly which courts should have jurisdiction to hear the dispute, and whose law should be applied to determine the illegality<sup>3</sup>? Where a programmer on one side of the world writes a program that contravenes the laws applicable within the borders of a territory on the other side of the world, which law should determine the liability of that programmer<sup>4</sup>? When one electronic newspaper publishes an article potentially defamatory of an individual on the other side of the world, which courts should hear the disputes and which standards should determine the liability of the newspaper<sup>5</sup>?

These are just some of the extraordinarily thorny issues to have been considered by courts around the world in recent months. Given the uncertainty, some attempt has been made to harmonise rules on jurisdiction. Within the EU, the Brussels Regulation<sup>6</sup> (which came into force

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\* Lionel de Souza, LL.M (Edinburgh); DESS Droit du Numérique (Paris XI), Paris and Charlotte Waelde, Co-director AHRB Research Centre for Studies in Intellectual Property and Technology Law, Edinburgh Law School.

<sup>1</sup> Johnson and Post. *Law And Borders -The Rise of Law in Cyberspace*. 1996, 48 *Stanford Law Review* 1367.

<sup>2</sup> See notably *League against racism and anti-Semitism (LICRA) French Union of Jewish Students v Yahoo! Inc (USA) Yahoo! France* Tribunal de Grande Instance de Paris 20 November 2000. Comment at [2001] *electronic Business Law Reports* 1(3) 110-120.

<sup>3</sup> *Ibid*

<sup>4</sup> *US v Sklyarov* For a full and informative account of this case see [http://www.eff.org/IP/DMCA/US\\_v\\_Sklyarov/us\\_v\\_sklyarov\\_faq.html](http://www.eff.org/IP/DMCA/US_v_Sklyarov/us_v_sklyarov_faq.html)

<sup>5</sup> *Gutnick v Dow Jones & Co Inc* [2001] VSC 305 (28 August 2001).

<sup>6</sup> Council Regulation on jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters COM (2000) 689 final. For a flavour of the debate that has surrounded this instrument, particularly as it will affect consumer contracts concluded over the Internet, see generally 'Electronic Commerce: Jurisdiction and Applicable Law' 4-5 November 1999, Position papers submitted to the European Commission. <http://europa.eu.int/comm/scic/conferences/991104/contributions.pdf>

and replaced the Brussels Convention in March 2002<sup>7</sup>) seeks to revise certain jurisdiction rules applicable to exploitation over the Internet, the purpose being also to streamline enforcement of judgements. That this area is fraught with political difficulty can be seen by the failure to reach agreement at the Hague Conference on International Private Law where delegates sought to find a similar solution but on an International basis<sup>8</sup>. As regards choice of law, within the EU it has recently been announced that the Rome Convention<sup>9</sup> will be revamped and extended, and in particular the question of non-contractual liability will also be addressed. Once again the intention is to bring the law into line with the reality of dissemination and exploitation using a medium without apparent borders. It is not the purpose of this article to revisit these difficult issues. Rather it is to examine one particular area - that of moral rights - and to discuss how these cross border conflicts might impact on the existence and exercise of these rights.

### What are moral rights?

Moral rights can be described as attributes of copyright directly attached to the person of the author. The purpose of moral rights is to grant the author the respect he deserves for the personal investment made in the process of creation and therefore exist regardless of any financial or patrimonial consideration. Moral rights are most closely linked with those territories which adhere to the Civilian or “droit d’auteur” system of protection for creative works. By contrast, those who follow the common law or Anglo-American approach place the economic interests bestowed by copyright as the matter of fundamental importance. In these countries moral rights, if present in domestic legislation, tend to be weak rights introduced in response to international obligations. The major difference in emphasis between the two streams has been expressed by opposing “‘common law copyright’, with its emphasis on protection of economic rights, and ‘civil law authors’ rights’, which puts the author in the first place”<sup>10</sup>.

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<sup>7</sup> The Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters 72/454, 1972 OJ (L299) 32. (the Brussels Convention). The Brussels Convention applies in courts of contracting States of the EU where the defendant is domiciled in a Contracting State. The Lugano Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters Convention 88/592, 1988 OJ (L319) 9 extends the Brussels Convention to EFTA States. One of the main aims of these Conventions was to ensure that a judgement granted in one contracting state would be recognised and enforced in another with the minimum possible of formalities. One of the main mechanisms was to harmonise rules on jurisdiction. See generally Anton with Beaumont Private International Law 2nd ed. W Green 1990 p154. The Brussels Regulation replaced the Convention in March 2002.

<sup>8</sup> Hague Conference on Private International Law. For full information on the problems faced during the negotiations in 2001, see <http://www.hcch.net/e/workprog/jdgm.html>

<sup>9</sup> EC Convention on the Law Applicable to Contractual Obligations (Rome 1980)

<sup>10</sup> Davies, The Convergence of Copyright and Authors’ Rights – Reality or Chimera ?, (1995) 26 IIC 964.

The major moral rights, to be found in the Berne Convention for the Protection of Literary and Artistic Works 1886 and which are the minimum standards which should be incorporated into the domestic laws of those countries who are signatories to that Convention are found in Article 6bis. That article provides that 'independently of the author's economic rights and even after the transfer of the rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to ...the work which would be prejudicial to his honour or reputation'. The rights are to last at least until the expiry of the economic rights with a concession for countries whose legislation at the time of accession to the Convention does not provide for the protection after death of the author to provide that some of the rights may cease to be maintained after death.

### Shaping copyright for the digital era

The law of copyright in general has undergone dramatic transformation over the last five years. Largely in response to the fears of those at the helm of the music industry, that of seeing their content being washed away through the electronic sieve<sup>11</sup>, measures to shape copyright at the international, regional and domestic level have been hammered out. One of the earliest International Treaties to address the digital age, the WIPO Copyright Treaty (WCT), set the scene for copyright and the digital agenda as early as 1996. The US implementation of the obligations imposed under this Treaty followed in the form of the Digital Millennium Copyright Act 1998 (DMCA). Europe has recently enacted the European Parliament and Council Directive on the harmonisation of certain aspects of Copyright and Related Rights in the Information Society (the Infosoc Directive)<sup>12</sup> due to be implemented in the 15 Member States by 22 December 2002.

Three main strands or planks are discernible from this programme. The first is the move to introduce or clarify rights concerning digital dissemination of works where it was felt that existing rights did not adequately protect copyright owners or did not do so with sufficient precision. Thus in the WCT<sup>13</sup> and in the Infosoc Directive<sup>14</sup> rights concerning communication to the public and making available to the public of works on the Internet have been addressed. Second, within Europe at least, there is an attempt to harmonise the exceptions and limitations

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<sup>11</sup> Dommering. Copyright Being Washed Away through the Electronic Sieve: Some Thoughts on the Impending Crisis. The Future of Copyright in a Digital Environment. Hugenholtz (ed) Kluwer 1996. 1-11.

<sup>12</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>13</sup> Article 8.

<sup>14</sup> Article 3.

to copyright laws throughout the Member States. The Infosoc Directive contains an exhaustive list of these elements in the text, the majority of which the Member States have the option of incorporating into domestic law<sup>15</sup>. Finally there has been a move to validate the technical protection measures rights holders use in conjunction with the dissemination of their works over the internet, such as anti-copying devices, and in tandem, the outlawing of the circumvention of these devices<sup>16</sup>.

### Moral rights in the digital area?

However, in all this flurry, relatively little attention has been paid to the question of moral rights<sup>17</sup>. The WCT merely requires signatory states to abide by Articles 2-6 of the Berne Convention but says nothing new about moral rights. Certainly, the Treaty negotiated at the same time as the WCT, the WIPO Performances and Phonograms Treaty (WPPT) requires the introduction (where not already enacted) of moral rights for performers concerning their live aural performances and those fixed in phonograms<sup>18</sup>. But that is as far as it goes. Moral rights are absent from the DMCA 1998. The Infosoc Directive makes no mention of moral rights either, preferring rather to leave consideration of these to individual member states<sup>19</sup> apparently on the basis that moral rights will not distort the functioning of the internal market: but is this really the case? Certainly, further attempts to deal with moral rights of audio-visual performers at international level have been beset with problems. At the time of finalisation of the WCT and WPPT in 1996, attempts were made to negotiate a Treaty covering audio-visual performers' rights both economic and moral. Consensus was not obtained at this time, but there was a commitment to return to the negotiating table at a later date. In December 2000 negotiations resumed. Once again, the question of moral rights for audio-visual performers proved problematic. At issue was the extent to which the right of integrity could be limited due to the need to edit films for public consumption<sup>20</sup>. Finally, the main committee adopted by consensus

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<sup>15</sup> Article 5. Unfortunately, the permissive nature of these exceptions or limitations greatly hinders the aim of harmonisation. It should be noticed, however, that the only mandatory exception in the text, Article 5.1 which provides for a mandatory exception for technical or transient copies, is directly connected to the digital area.

<sup>16</sup> See Waelde *The Quest for Access in the Digital Era: Copyright and the Internet* 2001 (1) *The Journal of Information, Law and Technology* (JILT). <<http://elj.warwick.ac.uk/jilt/01-1/waelde.html>>

<sup>17</sup> Moral rights were first included in the Berne Convention in 1928 (Rome Revision). At that time they provided that authors had 'the right to claim authorship of a work' and 'the right to object to any distortion, mutilation, or modification (of the work) which would be prejudicial to the author's honour or reputation'. These rights were nowhere near as extensive as those which had developed in France at that time. They endured only for the authors lifetime, and left the method of protection to each members domestic legislation.

<sup>18</sup> Article 5.

<sup>19</sup> Recital 19.

<sup>20</sup> In 1990, the Société Métropole Télévision M6 was forced to pay damages to Claude Sautet after cutting his film *Les choses de la vie* from 80 minutes to 64. Sautet (1990) *Tribunal de Grande Instance de Paris*, 14 Mars 1990,

Article 5 which would have granted performers the right of integrity and the right to be identified as the performer<sup>21</sup>. However, this was to be supplemented by an agreed statement, the purpose of which was to allow changes to be made for purposes ‘such as editing, compression, dubbing or formatting’, the effect of which would be to substantially water down the right of integrity<sup>22</sup>. Given that the negotiations finally broke up with no agreement having been attained on other Articles in the Treaty, whether the Article on moral rights survives in this form remains to be seen<sup>23</sup>. This lengthy, and fraught battle serves to highlight how entrenched the opposed positions are.

Why are moral rights considered problematic?

Why are some countries, notably those who follow the Anglo-American tradition wary of introducing a fully fledged moral rights regime? There may be a number of reasons for this, primarily rooted in economic argument. Firstly, it may be because of the potential impact the exercise of moral rights may have on economic exploitation of creative works. At their most

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Revue de la SACD No. 1 - 1er trimestre 1992, p. 59 quoted in Holderness Moral Rights and Authors' Rights: The Keys to the Information Age, 1998 (1) JILT [http://elj.warwick.ac.uk/jilt/infosoc/98\\_1hold/](http://elj.warwick.ac.uk/jilt/infosoc/98_1hold/).

<sup>21</sup> Article 5 of the draft treaty stated: Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live performances or performances fixed in audio-visual fixations, have the right (i) to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance; and (ii) to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation, taking due account of the nature of audiovisual fixations.

<sup>22</sup> The full agreed statement concerning Article 5 stated: For the purposes of this Treaty and without prejudice to any other treaty, it is understood that, considering the nature of audiovisual fixations and their production and distribution, modifications of a performance that are made in the normal course of exploitation of the performance, such as editing, compression, dubbing or formatting in existing or new media or formats, and that are made in the course of a use authorised by the performer, would not in themselves amount to modification within the meaning of Article 5(1)(ii). Rights under Article 5(1)(ii) are concerned only with changes that are objectively prejudicial to the performer's reputation in a substantial way. It is also understood that the mere use of new or changed technology or media, as such, does not amount to modification within the meaning of Article 5(1)(ii). The tensions and worries evident in this statement were anticipated by Cornish. ‘Those who organise complex audio or audiovisual productions resist the claims of all creative or interpretative contributors to be treated with the scrupulous concern appropriate to the sole genius. They do so now as never before, because the media, computer and telecommunications industries are together in the process of opening the Pandora's box of digitisation with its prospect of multi-media products which derive their content from a host of inputs, many of them existing copyright works. Great corporations, smart-card businesses and cottage whiz-kids are all going to want simple access to the pool of existing material and dread the prospect of copyright laws which allow self important, super-sensitive or (let's face it) silver-lining souls to flaunt their exclusive rights in ways that may put paid to new and exciting technologies’. Cornish *Authors in Law* 1995, MLR Vol 58, 1 at p2.

<sup>23</sup> The second, and crucial problem faced at the negotiations stemmed from the ownership of the exclusive economic rights (those of broadcasting and communication to the public, fixation, reproduction, distribution). Articles 6-11. The US delegation favoured the inclusion of a provision which would have automatically transferred performers economic rights to the producer thereby facilitating the exploitation of the film. In addition, in a move that is unusual for treaties dealing with intellectual property, a proposed clause would have in effect designated the law to be applied to determine the transfer of those rights. One option under consideration would have designated that law as that of the country most closely connected with the particular audiovisual fixation. The first choice in designating that country would have been that of the contracting party in which the producer of the fixation has his headquarters or habitual residence. The effect would have been to allow a country to ‘export’ its domestic law. Of particular concern was the effect that the US work for hire doctrine would have on the ownership and exploitation of films in foreign countries. For a detailed discussion see von Lewinski *The WIPO Diplomatic Conference On Audiovisual Performances: A First Resume* 2001, E.I.P.R. 23(7), 333-343.

extreme, moral rights allow an author a perpetual right to exert some control over the use of a work, and how the work may and may not be exploited in the marketplace<sup>24</sup>. The exercise of moral rights thus impedes the finality of contracts, and inhibits the freedom of the holders of the economic rights to deal with the tangible object embodying the work. In essence, they detract from the ability of those who wish to transform the author's work into another medium, to do so without interference<sup>25</sup>. They are thus inconsistent with the absolute nature of property, and with its alienation<sup>26</sup>.

Second, the reluctance is also likely to stem from the differing historical traditions. Moral rights and their association with the author stemming from theories of natural rights, have not been a part of the historical development of copyright in the Anglo-American traditions. Indeed, in 1996 it was said by a US commentator that:

'It may be a good idea to try to incorporate some *droit d'auteur* concepts in US copyright law. However, this may be a difficult, if not impossible exercise. In any case, the US and Europe need a common standard for treating commercially exploitable works on the Internet. If Europe wants to be on the same level as the US, it will probably have to be without the author's rights paradigms. The US most likely will not accept them<sup>27</sup>'.

Leading on from there may be the perception that moral rights are largely associated with ideal of 'romantic authorship': the view that works protected by copyright are produced by those tucked away in their lonely garrets, labouring long and hard over a creative work. The reality for many, from the earliest times, appears to have been different. Creativity has always been associated with wealth and the desire of the wealthy to own creative objects, followed by the economic advantages that could be gained from exploiting works for the masses<sup>28</sup>. Copyright has,

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<sup>24</sup> Hansmann and Santilli *Authors' and Artists' Moral Rights: A Comparative legal and Economic Analysis* 1997, 26 J Legal Stud 95 p101. See also Drier: 'The introduction of a moral rights regime has been and continues to be fiercely combated mainly by US industries and US industry oriented policy which tend to favour the interests of producers in commercialising the protected work with as few restrictions as possible from residual rights vested in authors'. Drier *Copyright issues in a Digital Publishing World* <http://associnst.ox.ac.uk/~icsuinfo/dreier.htm>. This idea of the performer having the ability to determine or control or even an influence over the way in which audio-visual productions are dealt with once filmed appears to be at the heart of what has driven the desire to see the inclusion of the agreed statement concerning Article 5 of the audio-visual performers treaty.

<sup>25</sup> Some argue that establishing a 'moral right imposes a real economic and political cost on society'. Those who want to use works need to deal with two owners: the moral and economic. Each new use is 'at the mercy of the author'. Lemley *The Economics of Improvement* 1997, Texas Law Review Vol 75:989 p1032. Lemley also argues that no parodies or satires would be permitted. But cf French Intellectual Property Code L122-5.

<sup>26</sup> In the UK, it has been argued that because every infraction of a moral right impairs another person's freedom to do business, enforcement should be confined to cases of real injury *Cornish Intellectual Property* 11-89.

<sup>27</sup> Lehman in colloquium discussions in *The Future of Copyright in a Digital Environment* Hugenholtz (ed) Kluwer 1996 p 239.

<sup>28</sup> In *Worldly Goods. A New History of the Renaissance* MacMillan 1996, the author, Professor Jardine, argues that from the mid fifteenth century important artists were to be found wherever a major trading centre was located: 'and there

however, always needed some association with the author because of the desire to justify such elements of the right as the term of protection, and the requirement of some creative spark, both intimately linked to authorial contribution.

A third reason may lie behind the reluctance of those within the Anglo-American systems to embrace moral rights, and that may stem from the very low level of originality required from an author before a work produced by her can qualify for copyright protection, summed up in the phrase: 'What is worth copying is *prima facie* worth protecting'<sup>29</sup>. It is perhaps notable that when copyright can protect something as mundane as football pools coupons and telephone directories, many are likely to balk at the idea of giving rights to the individual author to object to derogatory treatment, or to insist on being credited as author of that type of work.

Suffice it to say that it is unlikely in the foreseeable future that agreement will be attained at international level in relation to moral rights. But these tensions between the two systems may become more rather than less pronounced as trade in creative works over the Internet increases.

### Moral rights and the information era

What effect might the failure to deal with moral rights for the digital era have on exploitation of creative works made available over the Internet? One writer has suggested that it could mean that the laws of those territories who have the most protective moral rights regime could be applied to any work made available over the Internet<sup>30</sup> where the work is accessible in that territory. Thus the standards set by the most protective regime could be applied to the exploitation of all creative works whether or not the domestic law of the author would provide such rights.

### The notion of territoriality in the law of copyright

The law of copyright has its own territorial rules an understanding of which is essential to be able to appreciate the difficulties that become apparent in relation to the cross-border availability of

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are therefore wealthy entrepreneurs to purchase' p123. She goes on to say that: 'The period of transition from manuscript to print, the relationships between authors, manufacturers, buyers and backers were shaped by...opportunities which characterise any innovation in the commercial sphere. The prospect of producing an individual work in print ...was above all a business opportunity, suggested by a 'gap in the market' or by a recognised local demand for printed material of a particular kind'. P142.

<sup>29</sup> *University of London Press, Ltd. v. University Tutorial Press, Ltd.* [1916] 2 Ch. at p. 610. Peterson.J.

<sup>30</sup> *Gigante Ice Patch on the Information Superhighway: Foreign Liability for Domestically Created Content* 1996, 14 *Cardozo Arts and Entertainment Law Journal* 523 at 532.

works protected by copyright. The heart of the system is well illustrated by the following quotation:

“There is no international copyright law as such, but rather a collection of national copyright laws, bound by the Berne Convention into a multilateral non discrimination (national treatment) accord”<sup>31</sup>.

The notion of territoriality within the law of copyright is considered as being ‘capable of many different definitions’<sup>32</sup>. It is, however, the cornerstone of the oldest International Treaty concerned with the protection of copyright and related rights, the Berne Convention<sup>33</sup>. That the interests of authors and owners of copyright deserved to be protected in a world where tangible works protected by copyright could be traded both at home and abroad was uppermost in the minds of the drafters of the original Berne Convention. However, that desire was tempered by the practicalities of the need to find some common ground amongst interested parties whose substantive copyright laws diverged in many respects. In 1886 this led those same drafters to create minimum standards of protection in the Treaty: ‘a floor, but member countries may vary the height of the ceiling’<sup>34</sup>.

The ceiling is an essential element in considering the notion of territoriality. It is deeply linked with the idea that each country disposes of its own set of rules relating to copyright laws, at least affording minimum standards of protection. Copyright rules thus recognise a set of rights for an owner or author within the borders of one state. The result is that the laws applicable in one territory will not be applied to infringements that occur abroad.

The limited scope of each of the copyright systems had to be compensated by a mutual recognition of the rights of the authors. This was achieved through the adoption of what is known as the ‘national treatment principle’ and which is the most striking evidence of the implications of the territoriality principle. By the operation of this rule, the nationals of the signatories of the Berne Convention are granted in a foreign country the benefit of the same rights as those granted to the nationals of that country. This is expressed in article 5(2): ‘the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed’. There has been some discussion over the

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<sup>31</sup> Ginsburg, Private International Law Aspects of the Protection of Works and Objects of Related Rights Transmitted Through Digital Networks, Geneva December 16 to 18, 1998, (hereafter Ginsburg 1998)  
[http://www.wipo.int/eng/meetings/1998/gcpic/doc/gcpic\\_2.doc](http://www.wipo.int/eng/meetings/1998/gcpic/doc/gcpic_2.doc),

<sup>32</sup> *ibid.*

<sup>33</sup> The Berne Convention for the Protection of Literary and Artistic Works 1886

<sup>34</sup> Ginsburg 1998.



years as to the meaning to be attributed to the phrase ‘the country where protection is claimed’. Some have argued that it should be interpreted as the law of the forum, as that is where the claimant seeks protection. Others argue that it is rather to be interpreted as the country ‘for which’ protection is claimed against infringing acts occurring there. Most commentators now agree that the second interpretation is the one to be preferred<sup>35</sup>, and indeed, it is the interpretation that is consistent with the accepted notion that there is no such thing as international copyright law, but rather a collection of national laws<sup>36</sup>.

Territoriality thus gave valuable protection to authors who sought to expand their markets for their works beyond their home shores. It was the means by which these markets could be exploited whilst at the same time according protection to the authors, and control over the fruit of their labours. And so it worked, and appeared to work well: until the inexorable rise of the Internet and information technologies. National treatment, once lauded as providing the basis for protection for those who wanted to venture into foreign territories has suddenly become a complex maze seemingly set to trap copyright owners in pursuit of those who infringe their copyright around the globe.

The first problem for copyright owners stems from the mobility of the Internet. Mobility in this context means that Internet sites are of such a nature that it is relatively easy to relocate them within a very short timescale, sometimes within only a matter of hours. This relocation can be within a particular territory, or notably between different territories. This fluidity has raised serious debate in International Private law. Questions revolve around the appropriate means of determination of the forum as well as the law to be applied to any infringement<sup>37</sup>.

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<sup>35</sup> *ibid* p35.

<sup>36</sup> However, it should be noted that this idea of territoriality does not prevent the courts of a country from applying laws that are not their own. Thus jurisdiction may be seized in the courts of one country, perhaps on the grounds of domicile of the defendant (Brussels Convention Article 2) or of one of many defendants (Brussels Convention Article 6(1)). Nevertheless, if the alleged infringement of copyright takes place abroad, then the laws of the place where the reproduction took place will be applied to determine the extent of the infringement. See the UK case *Pearce v Ove Arup Partnership* [1999] FSR 525 where jurisdiction was accepted in the English courts on the basis of Article 6(1) Brussels Convention (multiple defendants) but as the alleged infringement took place in Denmark (the copying of architects plans by constructing a building to the design) Dutch law is to be applied to determine the extent of that infringement.

<sup>37</sup> See Ginsburg 1998, above and in addition the papers on Private International Law and Intellectual Property to be found on the WIPO website. There were two conferences, the first in 1998, and the second in 2001, both of which resulted in a number of articles. Particularly useful references are as follows: Lucas Private international law aspects of the protection of works and objects of related rights transmitted through digital networks. Paper GCPIC/1. Lucas, Private international law aspects of the protection of works and of the subject matter of related rights transmitted over digital networks Paper WIPO/PIL/01/1. Ginsburg, Private international law aspects of the protection of works and objects of related rights transmitted through digital networks Paper GCPIC/2. (Cited in this article). Ginsburg, Private international law aspects of the protection of works and objects of related rights transmitted through digital networks (2000 update) Paper WIPO/PIL/01/2. Austin, Private international law and intellectual property rights A common law overview Paper WIPO/PIL/01/5. See also Torremans, Private

The second essential feature inherent in the Internet, and one that is more deeply linked with this analysis is the fact that the Internet permits a wide dissemination of information and thus of copyright works. This also provokes an important question as to the relevance of territoriality. As Ginsburg has said, ‘now that digital media make possible the instantaneous, world-wide communication of works of authorship, the territorially discrete approach to international copyright has come under considerable strain’<sup>38</sup>.

The Internet has thus put the practice of national treatment, not to mention the theory that sustains it, in a predicament. The distribution of an infringing copy of a work immediately becomes international on the Internet, and the harm is thus felt in several fora by the author and copyright owner. This provokes clashes between the different systems. The content if not the nature of moral rights differ as between various countries and as territoriality imposes the application of the law of the country where protection is claimed, the benefits of protection vary from jurisdiction to jurisdiction. Consequently, it might be possible for authors to choose the law and thus the most advantageous provisions to be applied to their case.

In this perspective, the disparities in the content and the nature of moral rights in France and the United Kingdom give a perfect field of analysis. In particular, the French case law has reached a point which might suggest an expansion of the scope of territoriality. This analysis will be combined with the findings of the European Court of Justice (the ECJ) in the case of *Shevill*. This latter point will be considered first as it is the one that would permit ‘forum shopping’ by the author.

#### The ECJ in “*Shevill*” : A Basis for Forum Shopping?

The question at the basis of *Shevill v. Press Alliance*<sup>39</sup> was one of competence of courts in a cross-border wrongdoing. *Shevill* concerned defamation but non-the-less is instructive for this discussion for two reasons: firstly, it concerns different jurisdictions, namely France and England. Secondly, interesting comments are made in the case relating to the place of harm for cross-border delict cases.

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International Law Aspects of IP – Internet Disputes, in Edwards and Waelde, *Law and the Internet – A Framework for Electronic Commerce*, 2<sup>nd</sup> edition, 2000.

<sup>38</sup> Ginsburg 1998.

<sup>39</sup> *Shevill and Others v. Press Alliance*, case C-68/93 [1995] 2 WLR 499.

The facts were as follows: In 1989 an issue of the newspaper 'France Soir' published by a French company contained an article with comments about an individual resident in England, a company registered in Yorkshire, a company registered in France and a company registered in Belgium. The article contained defamatory material. An action was raised in England for damages in respect of copies of the newspaper distributed in England and Wales. An application was sought to have the case struck out on the grounds that the French courts alone had jurisdiction as the newspaper was domiciled in France. It was argued that Article 5(3) of the Brussels Convention<sup>40</sup> was irrelevant because as the matter related to tort, delict or quasi delict, the English courts did not have jurisdiction; that section related to 'the place where the harmful event occurred'; the harmful event in this case (being the publication of the newspaper), it was argued, had occurred in France.

The ECJ was asked for a preliminary ruling on two broad issues. The first was for guidance on the interpretation of the phrase 'the place where the harmful event occurred' to establish which court had jurisdiction where a defamatory statement was distributed in several States.

The solution given by the ECJ followed the principle laid down in the 1976 case of *Handelskwekerij G J Bier B. V. v. Mines de Potasse d'Alsace SA*<sup>41</sup>. The Court considered that action could be brought 'against the publisher either before the courts of the contracting state where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each contracting state in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the state of the court seised'.

This case concerned defamation. What might its application be in the field of copyright and, more specifically, moral rights?

The Brussels Convention certainly applies to intellectual property<sup>42</sup>. Intellectual property is a 'civil and commercial' matter to which the Convention is directed. Copyright infringement is thus included in the scope of the Convention<sup>43</sup>. Article 16(4) which gives exclusive jurisdiction to the courts of the State in which the intellectual property right is registered is not applicable to

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<sup>40</sup> This Article states: 'In matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred'.

<sup>41</sup> *Handelskwekerij G J Bier B. V. v. Mines de Potasse d'Alsace SA*, case C-21/76 [1976] E.C.R. 1735.

<sup>42</sup> See eg. *Pearce v. Ove Arup Partnership Ltd and Others* [1997] 3 All ER 31. For an in depth analysis of the interaction between private international law and intellectual property see Fawcett and Torremans *Intellectual Property and Private International Law* Clarendon Press Oxford 1998.

<sup>43</sup> See *Lloyd J in Pearce v. Ove Arup Partnership Ltd and Others* [1997] 3 All ER 31

copyright actions because ‘copyright does not require any registration or any deposit for its creation’<sup>44</sup>.

Rather, the actions for infringement are to be dealt with in application of article 5(3) as they are intended to repair a tortious action<sup>45</sup>. Thus the solution adopted in the Shevill case could find an application in the field of copyright.

Thus, where an infringing copy of a work protected by copyright is disseminated without authorisation over the Internet, Shevill would suggest that any court in the European Union could hear a case concerning that infringement<sup>46</sup>. Where the owner chooses to litigate in the courts of the place where the harm arose (perhaps where the original uploading took place, or where the work is stored on a server) then the courts of that country should be able to hear an action for all the harm that subsequently occurs. Where the owner chooses to litigate in a particular state where the harm is felt, the courts would only consider the extent of the harm within that particular state.

Critically for this study, the second part of the decision in Shevill made some important points as regards the law to be applied to the conflict. The Shevill court ruled that “the criteria for assessing whether the event in question is harmful and the evidence required of the existence and extent of the harm alleged... are not governed by the Convention but by the substantive law determined by the national conflict of law rules of the court seised”<sup>47</sup>.

This rule was laid down in the context of defamation: its application in the field of copyright seems likely to have much more dramatic effects. In this respect, two points deserve consideration. First, the rule laid down by the ECJ has to be considered in connection with the content of the rights afforded to authors. Moral rights differ in important substantive respects as between the UK and France. Defamation laws differ also, but it may be that these differences do not have the same impact on those affected. In Shevill the true reason behind the attempt by the plaintiff to sue before the English courts was that the law applied by them was: ‘more sympathetic towards plaintiffs than French law. The plaintiff did not need to prove actual damage and the good faith of the publisher was generally irrelevant’<sup>48</sup>.

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<sup>44</sup> Torremans, *Private International Law Aspects of IP – Internet Disputes*, in Edwards and Waelde, *Law and the Internet – A Framework For Electronic Commerce*, second edition, 2000, p. 227.

<sup>45</sup> See *Fort Dodge Animal Health Ltd and Others v. Akzo Nobel NV and Another* [1998] FSR 222.

<sup>46</sup> The Brussels Convention will apply wherever the defendant is domiciled in a contracting state. The location of the claimant is irrelevant.

<sup>47</sup> *Shevill and Others v. Press Alliance*, case C-68/93 [1995] 2 WLR 499.

<sup>48</sup> Forsyth, *Defamation Under the Brussels Convention : A Forum Shopper’s Charter?* [1995] CLJ 515.

The idea behind the eventual choice of a French court in the case of an alleged infringement of the moral rights of the author seems, at first sight, in the same line. However, it seems that such a case would take a step further. Indeed, in *Shevill* the differences that were circumvented by the choice of the English court concerned the ‘evidence required of the existence and the extent of the harm alleged’. This does not provoke a real clash between the two systems since both recognise the existence of the right to sue for defamation with more or less stringent conditions for indemnification. On the other side, moral rights do not seem to fit the same criteria. The circumstances of their existence generally differ<sup>49</sup>, sometimes to the point that some are likely to be considered as non-existent in UK law. Further, the grounds on which they are infringed differ substantially. This raises the situation where the choice of a forum by the author who sees his work put on the Internet without consent, and perhaps to the detriment of the work in question, will lead to a more pronounced avoidance of the rules of his home state than in defamation cases.

## Moral rights in France and the UK

Comparing moral rights as between the UK and France reveals some of these deep seated differences. Moral rights did not appear in UK legislation before the adoption of the Copyright Designs and Patents Act 1988 (CDPA 1988)<sup>50</sup> but, at common law, Courts used the general laws of defamation<sup>51</sup>, passing off<sup>52</sup> or injurious falsehood to find some, albeit limited, redress for litigants. The appearance of moral rights in the CDPA 1988 only occurred as a result of the ratification by the United Kingdom of the provisions of Article 6 bis of the Berne Convention adopted in 1928<sup>53</sup> but made compulsory in 1948<sup>54</sup>. As a consequence four moral rights were introduced in the 1988 Act<sup>55</sup>. These are the right to be identified as author<sup>56</sup> which requires to be asserted before it can be infringed<sup>57</sup> (the right of paternity), the right to object to derogatory treatment of a work<sup>58</sup> (the right of integrity), the right against false attribution of a work,<sup>59</sup> and the right to privacy in private photographs and films<sup>60</sup>. All these rights are inalienable<sup>61</sup> and

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<sup>49</sup> See the case of the right of integrity *infra*, where in the UK it is only considered as infringed if the derogatory treatment is likely to affect the author's honour or reputation while French law admits it much more easily.

<sup>50</sup> The right of integrity came into force on 1 August 1989.

<sup>51</sup> *Humphreys v Thompson* [1905-1910] Mac CC 148.

<sup>52</sup> *Samuelson v Producers Distributing* [1932] 1 Ch 201.

<sup>53</sup> Berne Convention, Rome version (1928).

<sup>54</sup> Berne Convention, Brussels version (1948).

<sup>55</sup> CDPA 1988 ss 77-89.

<sup>56</sup> CDPA 1988 s77.

<sup>57</sup> CDPA 1988 s 78.

<sup>58</sup> CDPA 1988 s80.

<sup>59</sup> CDPA 1988 s84.

<sup>60</sup> CDPA 1988 s85.

transmissible on death<sup>62</sup>. However, they may be waived at any time by agreement<sup>63</sup>. Subsequent case law has been patchy at best, but what there has been suggests in particular that the courts will use an objective rather than subjective test to determine derogatory treatment (possibly the most problematic moral right for exploiters), leaving an author at the mercy of third parties<sup>64</sup>.

French law and jurisprudence, on the other hand, places great importance on moral rights. Developed during the course of the nineteenth century through case law, they were codified in the 1957 Act<sup>65</sup>. French law now recognises the right of integrity or the “droit au respect de l’œuvre”<sup>66</sup>, the right to release, or to refuse to release a work, known as the “droit de divulgation”<sup>67</sup>, the right to withdraw or modify the work, known as the “droit de retrait ou de repentir”<sup>68</sup>, the right to be recognised as the author of the work or to remain anonymous, the right not to have a work attributed to another, and a right not to have a name associated with a work by another (“droit de paternité”)<sup>69</sup>. The extensive nature of moral rights under French law, evidencing the primary importance of the author in the system has been expressed through case law. The courts have, it could be argued, been rivalling each other in the use of terminology to underline this character. It has been said that “the moral right (...), aimed at protecting what is most precious to the author, that is the respect of his personality, is, by its very nature, unlimited in time and non transferable”<sup>70</sup>. Moreover, it should be kept in mind that the Courts in France consider that “the exercise of the moral right by the author of an original work bears a discretionary character and therefore the appreciation of the legitimacy of this exercise exceeds the competence of the judge”<sup>71</sup>.

From the brief discussion above, the differences between the two systems are obvious. However, a case of particular relevance to this investigation, *Huston v Turner Entertainment Co*<sup>72</sup>, took a step further. An analysis of this case drives home the potential of the Internet and its

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<sup>61</sup> CDPA 1988 s94.

<sup>62</sup> CDPA 1988 s95.

<sup>63</sup> CDPA 1988 s87.

<sup>64</sup> *Tidy v The Trustees of the Natural History Museum* (1995) 37 IPR 501, *Morrison Leahy Music Ltd v Lightbody Ltd* [1993] EMLR 144, *Patersfield v Denham* [1999] FSR 168, *Alan Clark v Associated Newspapers* [1998] 1 WLR 1558; [1998] 1 All ER 959; [1998] RPC 261. See also *Vaver Moral Rights Yesterday, Today and Tomorrow* IJLIT Vol 7 No 3 2000 at 270.

<sup>65</sup> On this, see Davies, *The Convergence of Copyright and Authors’ Rights – Reality or Chimera?*, (1995) 26 IIC 964.

<sup>66</sup> French Intellectual Property Code Title 11 Article 121-1.

<sup>67</sup> French Intellectual Property Code Article L 121-2.

<sup>68</sup> French Intellectual Property Code Article L 121-4.

<sup>69</sup> French Intellectual Property Code Article L 121-1.

<sup>70</sup> See *T. civ. Seine*, 6 and 7 April 1949, *Pierre Blanchar et autres v. Sté Ets Gaumont*, JCP 1950, II, 5462 : “Le droit moral (...) destiné à assurer à l’auteur ce qu’il a de plus précieux, le respect de sa personnalité, est, par par son essence même perpétuel et incessable”.

<sup>71</sup> *Cass. Civ. 1<sup>e</sup>*, 5 June 1984, *RIDA*, April 1985, p. 150 : “L’exercice du droit moral par l’auteur de l’œuvre originale revêt un caractère discrétionnaire, de sorte que l’appréciation de la légitimité de cet exercice échappe au juge”.

<sup>72</sup> *Cass. Civ. 1<sup>e</sup>*, 28 May 1991 ; *Consorts Huston et autres c. Société Turner Entertainment Co. ; Syndicat Français des Artistes Interprètes et autres c. Société Turner Entertainment Co. et autres*, JCP (1991), II, 21731.

disregard of territorial borders and thus the principles on which the International Treaties are based.

### The Huston decision<sup>73</sup>

The problem in this case revolved around the intended broadcast by a French television channel of an audio-visual work: a feature film by John Huston entitled 'Asphalt Jungle'. The estate of the deceased director went before the French judge to try and prevent the broadcast of this film. The arguments put forward to support the claim concerned the moral rights of the director. The version that was to be aired was a coloured one, whereas the original version was in black and white. That the movie was not in colour was a deliberate choice made by John Huston, since he had the technical means to film in colour. Moreover, he always had expressed his opposition to any possibility of colourising his film. After his death, a coloured version was however made by Turner Entertainment Co. which had acquired the MGM catalogue in 1986 and thus became the holder of the copyright to the movie.

Two questions were at stake. The first, which is not central to the instant discussion, raised the issue of whether colouring a movie affected the moral rights of the creator (there is no doubt that it was an infringing act if it affected the integrity of the creation). In CDPA 1988 vocabulary, was it derogatory treatment? In line with its earlier jurisprudence<sup>74</sup>, the French court decided that adding colours to a film originally in black and white was a violation of the right of integrity of the author (the "droit au respect")<sup>75</sup>.

The second and most interesting question for this analysis dealt with the possibility of a foreign author invoking moral rights conferred by French law even if his country of origin (home state) did not afford authors any such right. The question under US law (home to Turner Entertainment Co.) was of particular relevance since the country had not ratified the Berne Convention at that time, but did so during the course of the action.

In considering the issue of recourse to French moral rights by the estate of a foreign author to prevent the public disclosure (in this case broadcasting) of an allegedly derogatory treatment of the audio-visual work, the French courts had to deal with some factual oddities under the French

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<sup>73</sup> *ibid.*

<sup>74</sup> For the addition of colours to an originally black and white photograph, see Cass. Crim., 3 March 1898, Ann. Propr. Ind. 1899, 72

<sup>75</sup> See on similar facts : TGI Versailles (Chambres Réunies), 19 December 1994, RIDA, April 1995, p. 389.

droit d'auteur texts. Indeed, Turner Entertainment Co. invoked its position as the author of the movie under US law. By stark contrast, French law does not allow for a non-physical person to be considered as the author of a protected work. Thus the first conflict arose between French and American law was as to the position of the author. The essential point of the debate revolved around this: if John Huston was not to be considered as the author of the film, he could not invoke the benefit of the moral rights since they are attached (under French law) to his sole person. A second conflict arose between the two systems at stake: could the moral rights granted by French law enable authors to circumvent in part the effect of an assignation which was valid in the country of origin?

In its decision, the Paris Appeals Court<sup>76</sup> considered that the answers to these questions should be given in favour of Turner Entertainment Co. As it was not in effect at the time of the assignation, the court refused to take into account the ratification by the US of the Berne Convention. As discussed above, the Convention text provides that 'the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed'.<sup>77</sup> More specifically that 'ownership of copyright in a cinematographic work shall be a matter for legislation in the country where protection is claimed'<sup>78</sup>. The only international instrument that could thus be referred to was thus the Universal Copyright Convention which did not deal with the definition of the author. The court then held that the law to be applied was that of the country of the work, ie. US law.

In considering this case the Paris Appeals Court faced a situation similar to that which was raised in the earlier case of Rowe<sup>79</sup>. In that case, Rowe had claimed for infringement of his moral rights (integrity and paternity) after Walt Disney Productions had produced and exploited an animation film entitled "The Aristocats". This was based on an original idea of Rowe's, who had assigned his rights to the work (initially intended to be produced with live animals) under English law. It is notable that the appeal case of Rowe was decided by exactly the same appeal court (Paris, 4<sup>th</sup> Chamber, section B) as decided the Huston case. Unsurprisingly, the two decisions show similarities in the justification of their dismissal of the moral rights infringement claims.

Notably, two points were considered. First, the Paris Appeals Court insisted both in Rowe and in Huston that "the legal certainty of contracts would be destroyed if a party were allowed to ignore obligations

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<sup>76</sup> *ibid.*

<sup>77</sup> Berne Convention, Article 5(2).

<sup>78</sup> Berne Convention, Article 14 bis (2).

<sup>79</sup> *Rowe c. Société Walt Disney Productions et autres*, Paris, 6 February 1986, JCP 1989, I, 3376 and [1987] F.S.R. 36.



entered into under the law of a specific country by availing itself of the contrasting law of another country”<sup>80</sup>.

Secondly, both decisions refused to treat the question of moral rights of the author as a matter of public policy which would have imposed the application of French law. The Court considered that “this concept of French public policy can be applied only with the greatest degree of precaution”<sup>81</sup> and that it could not be associated with “injuries which foreign citizens, especially minors, could endure, outside the scope of any contract, in application of customs which our civilisation condemns as infringing the most sacred elements of human beings, such as physical integrity or matrimonial freedom”<sup>82</sup>.

The Cour de Cassation in *Huston* however discarded this reasoning. Rather, this court, the highest French court, seemed to prefer the solutions adopted in the cases of *Société Roy Export et Charlie Chaplin c. Société Les Films Roger Richebé* (concerning the film *The Kid*)<sup>83</sup> and *Anne Bragance*<sup>84</sup>. With the *Huston* decision, the Cour de Cassation defined a principle emphasising the importance of moral rights to the French judge. In a short decision, the French court reaffirmed the principles governing moral rights in its jurisdiction. It based the ruling on two essential points. The court said that in France, “no prejudice can be made to the integrity of a work, regardless of the State in which it has first been disclosed”. In addition “its author is entitled, by the sole fact of creation, to the moral right established for his benefit”<sup>85</sup> by the French Code. Most important, these rules were said to be “laws of mandatory application”<sup>86</sup>.

The solution adopted by the court was thus not even founded on the arguments put forward by the *Huston* estate. No consideration was given to the effect of the Berne Convention. The Cour de Cassation considered the link between the creator and his work as predominant: no infringement of moral rights should be tolerated even where an assignation was governed by a foreign law. The importance of moral rights to the French judge was underlined by deeming them ‘rules of mandatory application’. By so doing the French Court put an end to any possibility of negating these essential rights of the author.

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<sup>80</sup> Rowe, *ibid.*

<sup>81</sup> *ibid.*

<sup>82</sup> CA Paris, 6 July 1989, *Société Turner Entertainment Co. c. Consorts Huston et autres*, D. 1990, J. 152

<sup>83</sup> Paris, 29 April 1959, JCP 1959, II, 11134. The facts of this case were different but the decision admitted the right for a foreign citizen to benefit from the protection of moral rights in France.

<sup>84</sup> Paris, 1 February 1989, D. 1989, Somm. 90. It is interesting to note that both cases of *The Kid* and *Anne Bragance* were decided by the same Chamber of the Paris Appeals Court (Paris, 1<sup>st</sup> Chamber).

<sup>85</sup> Cass. Civ. 1<sup>e</sup>, 28 May 1991 ; *Consorts Huston et autres c. Société Turner Entertainment Co. ; Syndicat Français des Artistes Interprètes et autres c. Société Turner Entertainment Co. et autres*, JCP (1991), II, 21731 : “aucune atteinte ne peut être portée à l’intégrité d’une œuvre littéraire ou artistique, quel que soit l’Etat sur le territoire duquel cette œuvre a été divulguée pour la première fois... la personne qui en est l’auteur du seul fait de sa création est investie du droit moral institué à son bénéfice”.

<sup>86</sup> Cass. Civ. 1<sup>e</sup>, 28 May 1991 ; *Consorts Huston et autres c. Société Turner Entertainment Co. ; Syndicat Français des Artistes Interprètes et autres c. Société Turner Entertainment Co. et autres*, JCP (1991), II, 21731 : “ces règles sont des lois d’application impérative”.

As a consequence of the decision it has been said that “the recognition of the pre-eminence of moral rights cannot be separated from the exclusive competence of the French provisions designating the person whom , as the creator of the original work , can prevail himself of these moral rights”<sup>87</sup>. The importance of the decision thus becomes clear. French law was applied in a situation where the foreign law (US Law) did not recognise moral rights at all. In addition, the foreign law allowed the author to assign his rights under contract thus relinquishing his position as the author of the work. Admittedly, the UK copyright system does not find itself in an identical situation since moral rights have now been enacted. However, the disparities in the extent of moral rights as between the UK and France could raise the question of the application of French moral rights for a British author whose work has been posted on the Internet without consent.

### Moral Rights on the Internet

Could the dissemination of a work on a website constitute an infringement of moral rights either in France or in the UK?

#### Integrity and Digitisation.

Infringement of an author’s moral rights could occur by the simple fact of digitisation of his work. Translating a work into digital form necessarily provokes a loss in quality due to the compression into a format capable of being understood by a computer. The differences in loss of quality will vary with the nature of the work. For instance, the digital version of a painting where the original is very detailed and with nuances in its colours might not be a satisfying copy of the original. An author might consider such changes violate his moral right of integrity. In the UK, however, it is very unlikely that this digital version of the painter’s work would be considered as derogatory treatment by the courts since objectively it is unlikely to be seen as sully his honour or reputation, amounting instead only to a slight loss in quality. The other view could be taken in France where the test for the violation of the integrity of the work is much lower and more subjective<sup>88</sup>. The artist could successfully argue that the lower quality affects his work to such a degree that is not acceptable to him. Going further, arguments could be taken from the size of the digital copy. In the UK, a court has said that the reduction of size

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<sup>87</sup> Avocat Général Lupi, conclusions for Cass. Civ. 1<sup>e</sup>, 28 May 1991 ; Consorts Huston et autres c. Société Turner Entertainment Co. ; Syndicat Français des Artistes Interprètes et autres c. Société Turner Entertainment Co. et autres, JCP (1991), II, 21731.

<sup>88</sup> In this sense, see French case on acts infringing the “spirit” of the creation : The moral rights of the author were infringed where a certain direction of actors was considered contrary to the spirit of a theatre creation : TGI Paris, 27 November 1985, Gaz. Pal. 1986. 2. Somm. 369.

of a number of paintings of dinosaurs for inclusion in a catalogue was not derogatory treatment<sup>89</sup> and so a UK author would be unlikely to have a remedy as a result of the change of size of a work brought about by digitisation. In another French case, the court considered that ‘the suppression of the lower part of the drawing which included the name of the represented person and the author’s signature’<sup>90</sup> infringed moral rights. As a consequence, in France an author could argue that the reproduction on the Internet of his work in a normal size infringes his moral right of integrity either because that work has to be compressed to fit the screen, or because of the impossibility to have the entire the creation on the screen. The user has to scroll down to get the visual effect of the work.

### The right of disclosure

The second instance in which the territorial approach of copyright laws in the domain of moral rights can lead to considerable problems is the right of disclosure. Extensive rights are granted in this category by the French Code. The right of disclosure (or non-disclosure) does not exist as such in UK legislation although it is fair to say that there is no compulsion on an author to disseminate a work once created. The author is perfectly at liberty to lock the work away and never make it available either in public or private. The French Code by contrast explicitly provides that “only the author has the right to disclose his creation...[and] he defines the means and conditions of this disclosure”<sup>91</sup>. This right of disclosure is considered as absolute and exclusive. The courts have clearly affirmed that the author has the right to “remain the sole judge of the opportunity of the publication”<sup>92</sup> of the work and that therefore no compulsory order for the disclosure of the work can be obtained before the courts<sup>93</sup>. The fact that a work might have been commissioned by a third party (what the US lawyers would designate as a work for hire<sup>94</sup>), makes no difference<sup>95</sup>. The right extends both to the timing of the disclosure and the way in which this disclosure is to take place. As a consequence, the author could prevent the dissemination of his work on a medium he considers inadequate as to the presentation and/or quality of his creation. This is of particular relevance in the case of dissemination in digital form over the Internet bearing in mind that such disclosure has to be agreed on by the author even after the transfer of the economic rights of exploitation to an assignee or licensee.

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<sup>89</sup> *Tidy v The Trustees of the Natural History Museum* (1995) 37 IPR 501.

<sup>90</sup> CA Paris, 31 October 1988, *Cahiers du Droit d’Auteur*, April 1989, p. 22.

<sup>91</sup> French Intellectual Property Code Article L. 121-2 : “L’auteur a seul le droit de divulguer son œuvre. Sous réserve des dispositions de l’article L. 132-24, il détermine le procédé de divulgation et les conditions de celle-ci”.

<sup>92</sup> Lyon, 17 July 1845, DP 1845. 2. 128

<sup>93</sup> See Cass. Civ. 14 March 1990, DP 1990. 1. 497 where the painter of a creation made “for hire” could not be forced to deliver the painting even though he considered it as completed.

<sup>94</sup> US Code Title 17, section 101 gives a definition of ‘work for hire’.

<sup>95</sup> See, Cass. Civ. 14 March 1900, DP 1900. 1. 497, where a painter who said not to be satisfied of the result of a portrait ordered from him could refuse to disclose it to the public even after its display in an art gallery.

Following on from this, concern can be expressed as to the essential character of the right of disclosure under French law and relative absence from UK law. The author could argue before the French judge that with respect to French territory, his rights have been infringed. As the infringing creation is accessible in that country, he thus could claim redress.

### Combining *Shevill* and *Huston*

In the light of the above, the second part of the *Shevill* decision will be revisited. This second element affirmed that ‘the criteria for assessing whether the event in question is harmful and the evidence required of the existence and extent of the harm alleged... are not governed by the Convention but by the substantive law determined by the national conflict of law rules of the court seised’<sup>96</sup>.

Indeed, the European judges determined that it should only be for the national judges to assess whether harm had been done by applying their own “substantive law determined by the[ir] national conflict of law rules”<sup>97</sup>. In consequence, it seems that the author who sees his work posted on the Internet could see in French courts the ideal forum for action, even though he can seek redress only for that part of the harm suffered in France. As we have seen above with the *Huston* case, the French Cour de Cassation considers that the French rules on moral rights are of mandatory application. In determining the question of rules of mandatory application, it has been said in relation to French procedure that:

‘when facing an international private law problem, the judge has first to consider whether his own law is of mandatory application and if, as a matter of fact, it necessarily requires to be directly applied to the facts of the case. If the answer is positive, there is no need to search further. In the opposite case, recourse has to be made to the conflict of laws traditional method. This latter method thus only comes to play after the possibility for the application of a law of mandatory application has been raised’<sup>98</sup>.

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<sup>96</sup> *Shevill and Others v. Press Alliance*, case C-68/93 [1995] 2 WLR 499.

<sup>97</sup> *ibid.*

<sup>98</sup> Loussouarn et Bourel, *Precis Dalloz de Droit International Privé*, 3<sup>rd</sup> edition, p. 172 : “confronté à un problème de droit international privé, le juge doit d’abord commencer par se demander si sa propre loi est une loi de police et si, en conséquence, elle requiert impérativement d’être appliquée aux faits de la cause. Si la réponse est affirmative, on ne va pas plus loin. Dans la négative, on revient à la méthode traditionnelle de la règle de conflit. Cette dernière joue donc en seconde ligne à partir du moment où l’hypothèse de la loi de police aura été levée.” ; cited by A. Françon in note under Cass. Civ. 1<sup>e</sup>, 28 May 1991 ; *Consorts Huston et autres c. Société Turner Entertainment Co.* ; *Syndicat Français des Artistes Interprètes et autres c. Société Turner Entertainment Co. et autres*, JCP (1991), II, 21731.

As the ECJ in *Shevill* said that reference had to be made to the national conflict of law rules of the court seised, French courts will apply their own moral right laws as they are of mandatory application.

### The strength of the *Huston* decision

Could it be argued that the *Huston* decision has no relevance in the UK and more generally in the states having ratified the Berne Convention? One might think so as by adopting the Convention, domestic laws would meet the minimum standards required: the floor<sup>99</sup> of the Convention. French judges might therefore show more reluctance in applying their own moral rights law to foreign authors. However two reasons suggest that is unlikely.

First, there is the extremely strong nature of the wording of the decision in *Huston*. The laws concerning the quality of author and his moral rights are clearly designated as mandatory. As the quote above shows, French international private law doctrine is explicit on this point. This same category of rules can also be found in British international private law. They are rules which are 'regarded as so important that as a matter of construction or policy they must apply in any action before a court of the forum even where the issues are in principle governed by a foreign law selected by a choice of law rule'<sup>100</sup>. The similarities with the French approach are striking.

Certainly, UK and French law have relatively similar ideas about the quality of author, so that application of the British concept may not be unacceptable for the French judge. However, the automatic application implied by the decision in *Huston* necessarily imposes the French rules of authorship along with its moral attributes. As a consequence of the importance given to these rules, the UK provisions are likely to be discarded even although they recognise, in the majority of cases, the author of a work as the physical person behind it.

Second, the disparities in the content of the moral rights discussed above should be considered. One of the essential points arising from *Huston* was that no moral rights were recognised in US law. This is not the case in the CDDA 1990. However, the rights afforded to the authors under that legislation are of a much more limited scope than those in France. The discussion above noted the differences that arise both between the right of integrity, and the ways in which the rights might differ in connection with dissemination of a work over the Internet. In this context,

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<sup>99</sup> Ginsburg, 1998 *ibid*.

<sup>100</sup> Law Com Working Paper No 87 (1984), Scot Law Com Consultative Memorandum No 62 para. 4.5.

it is interesting to consider also the right of paternity. Under the CDPA 1988 the right must have been asserted before being invoked by the author<sup>101</sup>. Thus, unless invoked, the author, under UK law will have no right to be identified as such. It is quite the opposite under French law<sup>102</sup>.

Application of the UK rules in the case of non-assertion, could thus be considered as a negation of the right and thus 'repugnant to [French] public policy'<sup>103</sup>. The provisions of the French Code would thus find mandatory application.

The 'threat' of the Huston decision to UK (and that of other countries) copyright is not in reality so much one of the extent of the rights granted. That is, in essence, in compliance with the principle of territoriality expressed in Berne Convention. Rather, it is as to the dramatic extension of the scope of the principle operated by the Cour de Cassation. By designating the rules as ones of mandatory application there is no possibility of employment of foreign law. As the Internet enables dissemination to the public on a much wider basis than other traditional means of disclosure, French law will always be applied in France where moral rights are at stake.

## Limitations

Combining Shevill and Huston necessarily leads to a reconsideration of the notion and consequences of territoriality of copyright law in the Internet era especially where some courts may be tempted to over-protect authors. The adoption of international standards on moral rights could prevent those situations from arising. However, recalling the failure to reach agreement on the audio-visual performers Treaty, combined with the absence of moral rights provisions in the Infosoc Directive and the reluctance on the part of some countries who are signatories to the Berne Convention even to include the minimum obligations on moral rights<sup>104</sup> would seem to make the prospect of such legislation a pure utopia. As a result reliance may have to be placed on national courts to adopt a reasonable position if and when questions of infringement of moral rights come before them.

Looking to the French courts, there are two arguments to suggest that this might just happen. The first concerns the moral right of disclosure. Despite the stringent application of this right by French courts, the wording in the French Code leads certain authors to consider that its scope

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<sup>101</sup> CDPA 1988 section 78.

<sup>102</sup> See Paris, 18 December 1990, D. 1993, 442 where it was considered that contractual provisions providing for the anonymity of the author are legal as long as they do not imply a definitive renunciation of moral right prerogatives, the author being entitled to revoke at any time his decision.

<sup>103</sup> See on these rules Cheshire and North's Public International Law, 13<sup>th</sup> edition (1999).

<sup>104</sup> It is questionable whether either the UK or US have met their obligations under this Convention.

and influence are not of such major importance. The exact text imposing the right of disclosure in the Code uses a word in the singular form in order to determinate how the disclosure is to take place. Indeed, in the French text uses ‘the means... of disclosure’ in the singular form<sup>105</sup>. This has lead certain writers to argue that once the author has disclosed his creation by any means, he cannot use his moral rights against third parties by saying that he did not agree to disclosure of his work on another medium. ‘This thus evidences that there can only be one disclosure of the work. After this, only are concerned the means of exploitation of the work which are part of the patrimonial rights’<sup>106</sup>. This interpretation tends to avoid the over influence of the moral rights, and especially that of disclosure. However this exegetic analysis of the French provision is not totally satisfactory as it avoids the fact that the author is also granted by the same text the right to determine ‘the conditions of disclosure’. These conditions could cover posting of the work on an Internet site.

The second argument concerns the right of integrity. The scope and influence of this right of could be limited by the fact that courts will not easily accept abusive recourse to the right where it appears that the authors (as they tend to do it more and more) are trying to engage in ‘patrimonialisation’ of their moral rights. In other words, authors may threaten to exert moral rights unless the exploiter will increase the price paid for the economic rights. This is especially true in situations where an assignation has been concluded by the author with another party. The terms of the CDPA 1988 do not expressly provide for the requirement of the specific mention of each means and conditions in which the rights are assigned. By contrast, the French Code is very strict in this respect and requires a specific term for transfer of the different types of rights: ‘each of the assigned rights [must] be individually specified in the assignment contract and that the domain of exploitation of the assigned rights be limited as to its scope and its destination, its territorial scope and length’<sup>107</sup>. Reference is thus once more made to the ‘droit de destination’ with the consequence that, to post a work on the Internet, the assignee will have to specify it in the contract. Nevertheless, any attempt to use moral rights as a lever to obtain monetary reward for granting consent to economic exploitation is likely to bring the author up against the view taken by the majority of the French doctrine : ‘it is right to think that the author who grants an authorisation on the basis of his patrimonial rights for a given use necessarily accepts the consequences linked with this use and cannot invoke his

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<sup>105</sup> French Intellectual Property Code art. L. 121-2 : “Il détermine *le procédé* de divulgation”

<sup>106</sup> Gelbras, *Les Œuvres en Ligne*, Dissertation for the DESS Droit du Numérique et des Nouvelles Techniques, 2000, to be found on the website [www.droitntic.fr.st](http://www.droitntic.fr.st) : “Ceci tend bien à prouver qu’il ne peut y avoir qu’une seule divulgation. Après celle-ci, il s’agit plus d’un mode d’exploitation qui relève des droits patrimoniaux”.

<sup>107</sup> FIPC, art. L. 131-3 : “La transmission des droits de l’auteur est subordonnée à la condition que chacun des droits cédés fasse l’objet d’une mention distincte dans l’acte de cession et que le domaine d’exploitation des droits cédés soit délimité quant à son étendue et à sa destination, quant au lieu et quant à la durée”.

moral rights – and especially the right of integrity – to hinder a use he has authorised. These rights cannot enable him to ‘take back with one hand’ what he has given with the other’<sup>108</sup>.

## Conclusion

It has been argued above that French moral right laws could be applied to authors whose works are disseminated over the Internet. In many cases, the action would be limited to the harm arising within French territory. Nonetheless, the differences between UK and French moral right laws suggest that an author might just engage in a forum shopping exercise to vindicate a perceived violation of those rights where no remedy would otherwise be available. French courts may not always be willing to offer the author the redress he seeks, particularly if an underlying motive might be to exert more money from the exploiter. But nonetheless, this must leave exploiters feeling vulnerable to the whims of aggrieved authors and artists particularly in an era when convergence of media is becoming a reality.

Apart from relying on the French courts to take a reasonable approach is there anything else that might make exploiters feel less vulnerable? Certainly the enormous practical difficulties combined with the expense of taking an action in France (where the author was not already based there) must deter all but the most resolute<sup>109</sup>. Although that of course would not prevent a pressure group from combining resources to bring a case, if only to make a point. Enforcement is another tricky question. As has been indicated, the Brussels Regulation in force in March 2002 will streamline still further enforcement issues, but that does raise problems of further expense for the author. One of the most potent remedies for an author holding a judgement from a French court determining that his moral rights had been violated, might be to require that the offending work was inaccessible within French Territory. This would be similar to the order handed down by the French court in the case of *LICRA v Yahoo! Inc*<sup>110</sup>, a criminal case where a French court ordered Yahoo!, an Internet Service Provider (ISP) based in the US to make information and artefacts concerning Nazi memorabilia inaccessible to French citizens on French soil where such activity was unlawful. The effect was to impose French criminal law standards in this area on an Internet Service Provider based in the US where such activity was

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<sup>108</sup> G Verken, French Avocat in Paris, cited by Gelbras, *ibid.* : “Il est juste de penser qu’un auteur qui délivre une autorisation au titre des droits patrimoniaux pour une utilisation donnée accepte nécessairement les conséquences liées à cette utilisation et qu’il ne peut invoquer les droits moraux qui sont les siens et en particulier le droit au respect pour entraver une exploitation qu’il a autorisée. Ces droits ne doivent pas lui permettre de ‘repandre d’une main’ ce qu’il a accordé de l’autre ”,

<sup>109</sup> It might of course mean that exploiters would be less willing to contract with French authors and performers.

<sup>110</sup> *League against racism and anti-Semitism (LICRA) French Union of Jewish Students v Yahoo! Inc (USA) Yahoo! France* Tribunal de Grande Instance de Paris 20 November 2000. Comment at [2001] *Electronic Business Law Reports* 1(3) 110-120.



not unlawful. Despite arguing that compliance with such an order was impossible, and seeking a declaration to that effect from the US court in San Jose, Yahoo! nonetheless modified its own behaviour by declaring that as from January 2001, all such artefacts and information would be banned from its servers. It might be thought that a judgement from a French court banning the availability of sites within France if the content violated moral rights might have the same effect. However, such an outcome might be affected by the US decision given in favour of Yahoo! Inc. in response to their request for a declaratory judgement in a US court that the French order was unenforceable against them in the US. On 7 November 2001<sup>111</sup> the Federal Court in San Jose accepted Yahoo's arguments that an American company hosting its site on the US territory could not be compelled to satisfy the laws of 200 different countries: such an outcome would 'chill[s] Yahoo!'s First Amendment rights'. Therefore, in the domain of Internet content, the solution adopted by the US court was that of the application of the national law of the site. The material which was objectionable in France would be judged by US standards, where it was not unlawful. The liability of the Internet Service Provider which made that content available would similarly be judged by the laws of the home country.

Does this solution reduce the scope of the *Shevill* and *Huston* decisions combined? Such a conclusion is far from certain. Indeed, nothing indicates that the French judge who decided that Yahoo! had to take the relevant technical measures in order to prevent access to the Nazi items available on their site, with the threat of fines if the order was not complied with would not, if another action is brought to him, consider Yahoo! liable and sanction the company once again. The US court was careful to consider notions of comity in its decision, but felt those issues were outweighed by the need to uphold the First Amendment. A French court might, as suggested, feel similarly constrained in weighing up any further violation by Yahoo! (or any other ISP) and consider that the principle of comity was outweighed by the obligation to uphold French criminal law. A conflict between two jurisdictions would then arise with no indications as to which should prevail. The likelihood of such a conflict in the area of moral rights could be considered as even stronger in the light of the above discussion on the *Huston* case.

What therefore might be other avenues of development? One of the difficulties faced by Yahoo! exemplified by the above case was that they were unable to limit the availability of the site within France, while at the same time having it available to surfers elsewhere in the world. In other words the information could not be geographically limited. As has been pointed out, this is one of the fundamental features of the Internet: it does not respect national borders. Information

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<sup>111</sup> *Yahoo! Inc v La Ligue Contre Le Racisme et L'Antisemitisme* Case No C-00-21275 JF

can, and does, flow seamlessly from one part of the globe to another. But there are certain worrying signs that in the not too distant future, this borderless nature of the Internet may be a thing of the past. Copyright owners are frantically building anti-copying mechanisms both into the hardware, software and works which are disseminated around the Internet<sup>112</sup>. The purpose behind these devices has always been said to be so that owners may control the copying of the works, and once copying can be controlled, so an economic return can be extracted for subsequent use. But what is to prevent these devices from containing mechanisms whereby dissemination will also be limited geographically? When combined with anti-copying devices within the hardware, there seems little to prevent geographic limiters being included. Faced with the threat of moral rights actions in France might just spur copyright owners to pour further resources into building such fences<sup>113</sup>. Such an outcome would be catastrophic for the philosophy that has always underlain the Internet: that of seamless communication and dissemination.

One of the positive outcomes of the threat hanging over the exploiters might of course to give greater respect to the authors and performers with whom they work. If the threat to exert moral rights is only done for the purpose of exerting greater financial return, then, as has been argued, the authors are likely to be given short shrift. However, if it is actually done to see the performance of a work realised such that it will meet the vision of the author, then exploiters may have to change their working habits to accommodate these concerns. An alternative or additional avenue for authors seeking to secure the integrity of their work might be to reach out to the end users of their work directly, by-passing the intermediary. This, of course, is not an option in all cases, but the Internet makes it much easier for an artist or author to contract directly with those individuals interested in their work, without the need for a third party in the distribution chain. An initiative being spearheaded by Lawrence Lessig of Stanford University appears designed to do just this. Plans have been announced to develop a 'creative commons', an initiative that is designed to make available flexible, customisable intellectual-property licenses that artists, writers, programmers and others can obtain free of charge to legally define what constitutes acceptable uses of their work. Terms might include a prohibition on alteration of the work, and that it may not be used without proper attribution<sup>114</sup>. In other words, defining moral rights by contract.

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<sup>112</sup> Marks and Turnbull 'The Intersection of Technology, Law and Commercial Licenses' [2000] EIPR 198.

<sup>113</sup> *ibid*

<sup>114</sup> For further information see <http://news.com.com/2100-1023-834775.html>.

<http://www.sfgate.com/cgi-bin/article.cgi?file=/gate/archive/2002/02/11/creatcom.DTL>

Perhaps these tensions, between States, between copyright owners and users, between authors and exploiters are necessary to push States towards constructive debate for the development of a coherent international copyright system which takes cognisance of the interests of all concerned, authors, exploiters and users, and which meets both public and private interests in so doing. Instead, and at present, it seems that uniformity of copyright laws tends to be achieved by means of the application of national standards to Internet Service Providers, by private interests building fences to protect content, and by self-interested lobbying groups blocking measures that might inhibit economic exploitation of works. The risk of such an hiatus is that of the adoption of a series of diverse and conflicting texts and measures finally hindering the application of each other resulting in chaos for all, and certainty for none.